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In The

Supreme Court of the United States

October Term, 1970

No. 70-3201

WILLIAM F. JORDAN and WILLIAM A. ROGERS, on Behalf of Themselves and All Others Similarly Situated,
Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

O'CONNOR, GREEN, THOMAS,
WALTERS & KELLY
KENNETH W. GREEN
JOE A. WALTERS
FRANK J. WALZ
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorneys for Respondent

1971—Northwest Brief Printing Co., 322 S. Fourth St., Minneapolis, 55415 338-5078

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The Respondent Montgomery Ward & Co., Incorporated ("Wards"), respectfully presents this brief in opposition to the Petition of William F. Jordan and William A. Rogers[1] ("Petitioners") for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit dated May 3, 1971.

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[1] Although the Petitioners have captioned their Petition as being "on behalf of themselves and all others similarly situated", and have attempted to argue the lower court's decision as though it applied to the class they purport to represent, the judgment sought to be reviewed does not purport to adjudicate the rights of anyone other than the named Petitioners and Wards. The specific question of whether claims under the Truth in Lending Act, more specifically, the claims of the Petitioners which were not dismissed, may be maintained as a class action is presently under advisement in the District Court.

INTRODUCTION

In accordance with Rule 40 of the Rules of this Court, Wards accepts the Petitioners' recital of the opinions delivered by the lower courts and the invocation of jurisdiction under 28 U.S.C.A. § 1254(1). However, Wards is dissatisfied with the Petitioners' formulation of the question presented, their statement of the statutory provisions involved, and their argumentative statement of the case, and presents its supplements and revisions below.

STATEMENT OF THE ISSUE

Does the civil liability section of the Truth in Lending Act, Section 130, create a private right of action for alleged violations of the Credit Advertising provisions of the Act, Sections 141-45?

The Eighth Circuit phrased the same question as follows: "[W]hether persons who plead that they were misled by and consummated credit transactions relying on advertisements not complying with the Credit Advertising provisions of the Act are entitled to maintain an action for civil liability as provided in Chapter 2 of the Act, specifically Section 130." (A-4)[2]

STATUTES INVOLVED

Outline of the Act. The Truth in Lending Act is the popular name given to Title I of the four-part Federal Consumer Credit Protection Act adopted by Congress in 1968. (P.L. 90-321; 82 Stat. 146).

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[2]References herein to the "A-" and to the "P-" refer to the Appendix to the Petition, and to the Petition for a Writ of Certiorari, respectively.

The Act itself is divided into three chapters. Chapter 1[3] is entitled "General Provisions" and contains the definitions used in the Act, provisions governing the determination of what constitute or are included within the terms "finance charges" and "annual percentage rates" as employed in the Act, provisions relating to administrative enforcement and a section creating criminal liability for willful violations of the Act.

Chapter 2 is entitled "Credit Transactions". It contains provisions relating to the statements of credit terms which the Act requires to be made at certain times by creditors to their customers in connection with credit transactions covered by the Act, namely, consumer loans and sales under "open end" and other types of installment credit plans. Chapter 2 also contains a section creating civil liability for violations of its provisions.

Chapter 3 is entitled "Credit Advertising". Its provisions include certain prohibitions against the advertising of credit terms which are not generally available to all consumers, and sections governing the credit information which must be included in advertisements containing any of the specific terms of an open end credit plan, or in advertisements designed to promote other credit sales or loans.

Text of Pertinent Sections. The provisions of the Act which are of particular relevance to the question resolved in the lower courts are as follows:

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[3]In United States Code Annotated, the word "Part" has been substituted throughout the Act for the word "Chapter" found in the official text. The letters "A", "B" and "C" have also been substituted for the numbers "1", "2" and "3", identifying the Chapters in the official text.

Chapter 1 — *General Provisions*

[15 U.S.C.A. §§ 1601-13.]

Section 108(a), (c), 15 U.S.C.A. § 1607(a), (c):

(a) Compliance with the requirements imposed under this title shall be enforced under

(1) section 8 of the Federal Deposit Insurance Act, in the case of

(A) national banks, by the Comptroller of the Currency.

(B) member banks of the Federal Reserve System (other than national banks), by the Board.

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 5(d) of the Home Owners' Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) The Federal Credit Union Act, by the Director of the Bureau of Federal Credit Unions with respect to any Federal credit union.

(4) the Act to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts.

(5) The Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

* * * * *

(c) Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under subsection (a), the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.

Section 112, 15 U.S.C.A. § 1611:

Whoever willfully and knowingly

(1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this title or any regulation issued thereunder.

* * * * *

(3) otherwise fails to comply with any requirement imposed under this title,

shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Chapter 2 — *Credit Transactions*

[15 U.S.C.A. §§ 1631-44.]

Section 130(a), (e), 15 U.S.C.A. § 1640(a), (e):

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

* * * * *

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

Chapter 3 — *Credit Advertising*

[15 U.S.C.A. §§ 1661-5.]

Section 141, 15 U.S.C.A. § 1661:

For the purposes of this chapter, a catalog or other multiple-page advertisement shall be considered a single advertisement if it clearly and conspicuously displays a credit terms table on which the information required to be stated under this chapter is clearly set forth.

Section 143, 15 U.S.C.A. § 1663:

No advertisement to aid, promote, or assist directly or indirectly the extension of consumer credit under an open end credit plan may set forth any of the specific terms of that plan or the appropriate rate determined under section 127(a) (5) unless it also clearly and conspicuously sets forth all of the following items:

(1) The time period, if any, within which any credit extended may be repaid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where periodic rates may be used to compute the finance charge, the periodic rates expressed as annual percentage rates.

(5) Such other or additional information for the advertising of open end credit plans as the Board may by regulation require to provide for adequate comparison of credit costs as between different types of open end credit plans.

STATEMENT OF THE CASE

On April 14, 1970, the Petitioners filed a two-count complaint against Wards.[4] Count I invokes the jurisdiction of the federal courts under Section 130 of the Truth in Lending Act, 15 U.S.C.A. § 1640. Its operative allegations are contained in eight separate subparagraphs of Paragraph 7, each of which purports to state a distinct claim for violation of a different provision or requirement of the Act, and/or of Regulation Z, 12 C.F.R. § 226, promulgated under the Act by the Board of Governors of the Federal Reserve System.

Five of the eight subparagraphs—b, e, f, g, and h (P-5, 6)—clearly allege violations of those provisions of the Act and Regulation Z which require the disclosure of certain credit terms on each periodic billing statement sent by a retailer to a credit customer who has an account under what the Act calls an "open end credit plan".[5] 15 U.S.C.A. § 1637(b); 12 C.F.R. §§ 226.5-6, 226.7(b).

The remaining subparagraphs of Paragraph 7 allege that while engaged in "advertising for sales, making credit sales,

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[4]The second count, alleging violations of state usury laws, was dismissed by the district court because of the absence of diversity jurisdiction and the court's discretionary determination not to exercise pendent jurisdiction, on the ground that the usury claim presented exclusively a question of state law, a question already pending in the Minnesota courts in two similar actions, one of them being an action against Wards by counsel for the Petitioners.

[5]The term "open end credit plan" encompasses what are popularly called "revolving charge accounts".

and sending periodic statements to the Petitioners", Wards violated the Act:

> a. By failing to disclose that any finance charge is being imposed on items offered for sale and all as required by 12 C.F.R. 226.10;
>
> * * * * *
>
> c. By stating that no payments whatsoever are required until some future date, without disclosing the imposition of a finance charge thereon;
>
> d. By containing numerous pages of advertisements of products and prices without any reference to the imposition of finance charges. (P-5, 6)

Wards challenged the allegations contained in these three subparagraphs in a Rule 12 motion in the District Court, arguing that they relate exclusively to the credit advertising provisions of the Act, Sections 141-5, that violations of the credit advertising provisions are not privately actionable under Section 130 of the Act, and that therefore the Court lacked jurisdiction over the subject matter of the allegations.

The District Court granted Ward's motion to strike all three subparagraphs, but permitted the Petitioners to take an interlocutory appeal under 28 U.S.C.A. § 1292(b).

The Eighth Circuit unanimously affirmed the dismissal of the allegations contained in subparagraphs a and d, on the ground that violations of the Credit Advertising Chapter, Chapter 2 of the Act, are not privately actionable in the federal courts and that enforcement of such provisions has been relegated to various administrative agencies under Section 108 of the Act. It reinstated subparagraph c, however, for the reason, said the Court, that the allegations contained in that subparagraph could arguably be construed to allege violations of the Credit Transaction Chapter, Chapter 2 of the Act, which the civil penalties provision, Section 130, was designed to remedy. (A-7)

Thus, contrary to the impression attempted to be created in the Petition, the question decided by the lower courts and attempted to be raised in this Court arises on the pleadings themselves, not on their merits. The question is simply whether persons who allege that they were misled by advertisements not complying with the credit advertising provisions of the Act are entitled to make those allegations in a private federal court action under Section 130 of the Act. Beyond that, again contrary to inferences created in the Petition, the issue is not whether aggrieved persons have *any* remedy for credit advertising violations, since an administrative remedy clearly exists, but whether they have a private civil remedy for such violations.

INTRODUCTION TO ARGUMENT

The Petitioners have urged this case upon the Court as one of first impression under the Truth in Lending Act, as though novelty itself were sufficient to satisfy the "special-and-important" case criteria specified in Rule 19 of the Rules of this Court. Wards freely admits that the Eighth Circuit is the first appellate court to have decided the question presented. It submits, however, that the question does not merit the attention of this Court for the simple reason that, while first in time under the Act, the question is not a difficult one.

The question of whether a private action may be brought to redress violations of the credit advertising provisions of the Act was in no way perplexing to either the District Court for the District of Minnesota or the Eighth Circuit Court of Appeals, nor is its resolution by other courts likely to occasion any decisional conflict in the future. The answer to the question is that no private remedy for credit advertising violations exists. The answer can be gleaned, first of all, by reading the Act. Its only civil liability section, by its own

language, does not extend to advertising violations, but confines itself to violations of portions of the Act distinct from the advertising portions. If the language of the Act were not enough, its legislative history is crystal clear. On more than one occasion it says that "the Bill specifically exempts credit advertising from the application of civil penalties," or words to the same effect. H.R. 1040, 1968 U.S. Code, Cong. & Ad. News, p. 1976.

In short, the question raised by the Petitioners is neither sufficiently nor potentially "unsettled" as to require "settlement" by this Court on writ of certiorari, within the purview of Supreme Court Rule 19.

ARGUMENT

The Basic Structure of the Truth in Lending Act; Required Credit Disclosures v. Credit Advertisements

The Truth in Lending Act distinguishes the commercial advertising of credit from required statements of the terms of credit being applied to customers' charge accounts and loans. It includes separate bodies of substantive law for each of these subjects, as well as different remedies for violations of them.

Chapter 2 — Required "Initial" and "Periodic" Disclosures

The "Credit Transactions" provisions of the Act are contained in Chapter 2, Sections 121-34. With reference to open end, or "revolving", credit plans of the kind maintained by Wards, Chapter 2 requires two types of disclosures by a retailer to its customers: (1) an initial written statement of the credit terms which will be applied to the account, made once, and only once, to a customer opening a charge account [Section 127(a)], and (2) a periodic statement of the terms being applied to the account, made at the end of each billing cycle, generally once each month. [Section 127(b).] No

credit advertisement, whether contained in a catalog, newspaper or leaflet, or heard or seen on radio or television, is an "initial" or "periodic" disclosure, nor is any credit advertisement intended to satisfy the initial or periodic disclosure requirements of Section 127 of Chapter 2.

Chapter 3 — Credit Advertising

The "Credit Advertising" provisions of the Act are contained in Chapter 3, Sections 141-45. Section 143 of Chapter 3 essentially requires that if a retailer advertises "any of the specific terms" of its revolving credit plan, it must also "clearly and conspicuously set forth" various additional credit information, including much of the same information which would be contained in an "initial" or "periodic" disclosure submitted to a credit customer under Section 127.

In the case of a credit advertisement in a catalog, the requirements of Section 143 are subject to the qualification, stated in Section 141, that the entire catalog will be considered a single advertisement "if it clearly and conspicuously displays a credit terms table on which the information required to be stated under this chapter is clearly set forth."

There is no special magic about a credit advertisement in a catalog, however, as distinguished from an advertisement of credit terms by any other commercial means. Section 226.2(b) of Regulation Z defines an "advertisement" as:

> "[A]ny commercial message in any newspaper, magazine, leaflet, flyer or catalog, on radio, television or public address system, in direct mail literature or other printed material, on any interior or exterior sign or display, in any window display, in any point-of-transaction literature or price tag which is delivered or made available to a customer or prospective customer in any manner whatsoever."

The scope of this definition itself should occasion a natural wariness for any conclusion that "credit advertising" dis-

putes are to become grist for the mill of the federal judiciary, without regard to their significance or the amount in controversy. Only the most explicit grant of federal jurisdiction and the clearest legislative intent should authorize the creation of a civil remedy which would permit any person who sees or hears a credit adverstisement, in any form in which it might appear, to have his day in a federal court to prove what he saw or heard and how it injured him. Neither statutory authorization nor congressional purpose, however, is anywhere in evidence in this case, and the lower courts so found.

The Sole Civil Remedy — Violations of Chapter 2

Section 130 of the Act, contained in Chapter 2, is the only provision in the Act creating a private right of action, and, as a consequence, the sole grant of federal jurisdiction in it. As the Eighth Circuit noted, however, the language of Section 130 is limited. (A-6) It creates a right of action for statutorily-defined penalties in favor of an individual against any creditor who fails "in connection with any consumer credit transaction" to disclose any information required to be disclosed "*under this Chapter* . . . to that person." "This Chapter" refers to Chapter 2. The principle of statutory construction, *expressio unius est exclusio alterius*, clearly applies to such restrictive language. The expression in Section 130 of its applicability to the Chapter in which it is contained, Chapter 2, plainly negatives its applicability to Chapter 3.

As previously stated, the disclosures required to be made by Chapter 2 in connection with credit transactions involving open end credit plans are the initial pre-account disclosure and the periodic statement disclosures. It is the failure to make proper initial and periodic disclosures, that is, the

non-disclosure or the erroneous making of disclosures required by Chapter 2, which is privately actionable under Section 130, and nothing else.

The dismissal of the allegations of the complaint affirmed by the Eighth Circuit was the dismissal of allegations purporting to state claims for violations of Chapter 3—the Credit Advertising Chapter. The allegations stricken are exclusively directed, not against alleged erroneous initial or periodic disclosures made by Wards under Chapter 2, but against advertisements by Wards in its catalogs of the terms upon which Wards will extend credit to purchasers of its merchandise. Subparagraph d of Paragraph 7 alleges a violation of Section 143 of Chapter 3, dealing with the advertising of open end credit plans, while subparagraph a alleges a violation of Section 226.10 of Regulation Z, adopted to implement the provisions of the Credit Advertising Chapter. But the Act creates no private right of action for violations of its credit advertising provisions, and violations of Chapter 3 are not actionable under Section 130 of Chapter 2.

Legislative History: Civil Remedy for Advertising Violations Withheld

The legislative history of the Act discloses that the withholding of a private civil remedy for credit advertising violations was intentional.

As originally introduced and passed in the Senate, the Act contained no reference to credit advertising. S. 5, 90th Cong., 1st Sess., January 11, 1967; July 12, 1967. The original House version did contain provisions relating to the advertising of credit terms. Although providing civil penalties for wrongful disclosures concerning credit transactions, it said nothing about credit advertising violations. H.R. 11601, 90th Cong., 1st Sess., § 206, p. 22, July 20, 1967. Later versions

of the House bill specifically excluded the credit advertising provisions from the application of the section relating to civil penalties. Ibid., p. 26, November 30, 1967; December 13, 1967.

Ultimately, the House bill was adopted by Congress in the form in which the Act now appears, with the "Credit Transactions" and "Credit Advertising" provisions contained in separate chapters, and with no private civil remedy provided for advertising violations.

The committee report which accompanied the bill submitted to the House on December 13, 1967, contains a statement, quoted by the Eighth Circuit in its opinion (A-6), as follows:

> "[*T*]*he bill specifically exempts credit advertising from the application of civil penalties.* This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of the bill would attempt to seek civil penalties." H.R. 1040, 1968 U.S. Code Cong. & Ad. News, p. 1976 [Emphasis added.].[6]

The reason given by the House committee for withholding a civil remedy for advertising violations, that is, to discourage a form of opportunism, in no way qualifies or obscures the fact that the civil remedy was withheld from everyone, including a person who sees or hears an advertisement and subsequently makes a credit purchase in reliance on it. By the same token, because the civil remedy was withheld from everyone, the already overburdened courts have been spared

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[6]See 1 CCH. Consumer Credit Guide. ¶2,000. "Enforcement" ("It is significant to note that the provisions relative to civil actions by private individuals do not cover credit advertising.") (1970). The Federal Reserve Board has issued informal letters concluding that the civil liability section does not extend to credit advertising violations. 3 CCH. Consumer Credit Guide. ¶30,034 (June 6, 1969); ¶30,408 (April 22, 1970).

from a myriad of private actions involving individual fact questions of reliance or lack of it.

A statement similar to that contained in the committee report was read into the Congressional Record by Congressman Wright Patman of Texas, Chairman of the House Committee on Banking and Currency, on the opening day of debate on the Consumer Credit Protection Act, January 30, 1968. In discussing the enforcement provisions of the Truth in Lending Act, Congressman Patman stated:

> "While provision is made in the bill for civil and criminal penalties, it is anticipated that the major enforcement activities will be carried out under the administrative enforcement provisions. It should be noted that while credit advertising is covered under certain of the disclosure provisions of the bill, such advertising cannot provide the basis for a civil suit. This exemption has been written into the bill by your committee to avoid the possibility that anyone seeing an advertisement not complying with [the] disclosure requirements would attempt to seek civil penalties." Cong. Rec., Jan. 30, 1968, p. H. 502.

These statements from the committee report and the House debate on the Act are clear manifestations of legislative intent, entirely consistent with the unambiguous language of a statute which actually requires no assist from legislative history in its interpretation.

Enforcement of Credit Advertising Provisions Reserved to Administrative Agencies

The theme of the Petitioners' request to this Court to review the judgment of the Eighth Circuit appears to lie in their assertion that the denial of a private right of action for credit advertising violations "is a severe hindrance to effective administration of the law." (P-9) This argument is little more than a warmed-over version of the Petitioners' ar-

gument in the lower courts that the absence of a private civil remedy leaves them virtually without any remedy. That is not at all true, however, as both of the lower courts recognized.

The Act entrusts the enforcement of its credit advertising provisions to one of a number of administrative agencies, depending upon the type of creditor involved. (See, pp. 4-5, supra). In Section 108(c), 15 U.S.C.A. § 1607(c), the Federal Trade Commission has been awarded general enforcement authority with respect to all creditors whose supervision is not specifically committed to other agencies, an investiture which, among other things, makes the FTC responsible for obtaining compliance with the Act by most retail merchandisers, including Wards.[7]

Section 108(c) provides in part that "all of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this Title . . . ." Among the FTC's powers under Section 5 of the Federal Trade Commission Act are the power to institute proceedings by complaint, to permit intervention in such proceedings by interested persons, to make findings of fact, and to issue cease and desist orders based upon violations of law determined to exist. Review of FTC cease and desist orders is available in courts of appeals.

The Petitioners therefore have recourse for violations of the Credit Advertising Chapter, but not in a private suit in the federal courts.

Finally, it should not be at all surprising that Congress saw fit to provide an administrative framework within which

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[7]In addition, the Act contains a criminal liability provision, Section 112, which provides for fines up to $5,000 or imprisonment for one year, or both, for willful violations of its requirements, including credit advertising violations.

the Act was to be enforced, or that the FTC was assigned the primary enforcement role with reference to the credit advertising sections. For the most part, the enforcement machinery was already in existence. The retailers, credit agencies and lending institutions covered by the Act had long been subject to the regulatory jurisdiction of the federal agencies specifically created to deal with their respective problems.[8] Furthermore, the FTC has historically been charged with the responsibility for preventing all unfair trade practices in commerce, including deceptive advertising, under the Federal Trade Commission Act. This historical regulatory pattern was continued by Congress in Section 108 of the Act.

As the District Court observed in its memorandum opinion, the general grant of authority in Section 108 "alerts this Court to the fact that unless otherwise clearly indicated the remedies for violations of the Act were intended by Congress to be administrative in nature." (A-10) Far from a "clear indication" of legislative intent to provide a civil remedy for credit advertising violations, however, it is quite apparent, in the words of the Eighth Circuit that "it was the intent of the Congress not to provide private civil relief for violation of the credit advertising provisions." (A-5-6)

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[8]In that regard, Congresswoman Leonor K. Sullivan of Missouri, the principal sponsor of the Act and the Chairwoman of the Consumer Affairs Subcommittee of the House Committee on Banking and Currency, stated during the debate in the House: "Unlike S. 5, the truth-in-lending provisions of H.R. 11601 are not 'self-enforcing'; instead we provided necessary administrative enforcement by appropriate government agencies—the same agencies which now have regulatory jurisdiction over the businesses which would be covered by the disclosure requirements of this bill.". Cong. Rec., Jan. 30, 1968, p. H. 508.

CONCLUSION

For all of these reasons, Wards respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

O'Connor, Green, Thomas,
Walters & Kelly
Kenneth W. Green
Joe A. Walters
Frank J. Walz
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorneys for Respondent

July 20, 1971.